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PETER OLA BLOMQVIST v. ZAVARCO PLC & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEALS NO: W-02(IM)(NCVC)-870-06-2015, W-02(IM)(NCVC)-809-05-2015, W-02(IM)(NCVC)-869-05-2015, W-02(IM)(NCVC)-811-05-2015 & W-02(IM)(NCVC)-810-05-2015]
28 JANUARY 2016

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CIVIL PROCEDURE: *Stay of proceedings – Application for – Action against company directors for breach of fiduciary duties – Jurisdiction – Forum non conveniens – Company incorporated in United Kingdom with business address in Malaysia – Whether internal management of company governed by law of place of*
D *incorporation – Dealing of company shares – Whether issuance and tradability of shares governed by laws of United Kingdom – Whether dispute should be heard in Malaysian courts – Whether United Kingdom a more suitable and appropriate forum to determine dispute – Whether stay application ought to be allowed*

CIVIL PROCEDURE: *Jurisdiction – Forum – Proper forum to commence action*
E *– Action against company directors for breach of fiduciary duties – Company incorporated in United Kingdom with business address in Malaysia – Whether internal management of company governed by law of place of incorporation – Dealing of company shares – Whether issuance and tradability of shares governed by laws of United Kingdom – Whether dispute should be heard in Malaysian courts*
F *– Whether United Kingdom a more suitable and appropriate forum to determine dispute – Whether stay application ought to be allowed*

These five appeals arose from five separate applications filed by the six respondents ('the defendants') for a stay of the appellant's ('the plaintiff') action on the ground that the Malaysian court should not hear the issues and
G disputes forming the subject matter of the action. The plaintiff was a public limited company incorporated in the United Kingdom. The registered address of the plaintiff was in Surrey, United Kingdom while its business address was in Kuala Lumpur. The first to fifth defendants were at all material times directors of the plaintiff, while the sixth defendant was a
H purported shareholder of unpaid shares in the plaintiff. The plaintiff claimed that the defendants wrongfully and maliciously conspired and combined amongst themselves to injure the plaintiff in the business with an objective to siphon the share capital of the plaintiff for their respective benefits by unlawful means. It was further alleged that the first and second defendants
I had violated laws and breached their fiduciary duties which they owed to the plaintiff, committed fraud against the plaintiff and unlawfully benefited from the issuance and allotment of the unpaid shares to them which were recorded as fully paid adding that by reason of these unlawful acts, the first to sixth

defendants had clearly and blatantly breached their duties as directors of the plaintiff under various statutory, fiduciary and common law duties and obligations. The plaintiff consequently suffered loss and damage and by writ of summons and statement of claim claimed for, *inter alia*, special damages in a sum equivalent to €120,000,000 against the first to fifth defendants; an injunction against the first, second and sixth defendants to prevent the transfer, disposal and dealing with the plaintiff's shares and from exercising any right in relation to the 1,200,000,000 shares including voting, as well as general damages, interests and costs. The first, second, fifth and sixth defendants filed their respective applications in encls. 17, 25, 28 and 30 while the third and fourth defendants jointly filed their application to stay the plaintiff's action against them on the ground of *forum non conveniens*. The High Court, in dismissing the said applications, held that the core issue of whether the 1.2 billion shares in the plaintiff issued to the first and second defendants were fully paid or unpaid would more conveniently be heard in Malaysia as the dispute essentially was between mainly Malaysians, whose business was predominantly in Malaysia, and the fact that the laws of the United Kingdom might apply was not a determining factor in the matter of *forum conveniens* or *non conveniens*. Thus, the appeals herein. In gist, it was contended that the High Court Judge had erred in law and in fact in failing to hold that the necessary evidence to be adduced on the validity of the issuance of the 1.2 billion shares in the plaintiff was the evidence amongst others, of parties based in the United Kingdom namely the plaintiff's company secretary, share registrar and the auditors who prepared the plaintiff's annual reports and financial statements which confirmed that the plaintiff's 1.5 billion current share capital was fully paid up.

Held (allowing appeals; setting aside decision of High Court)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The plaintiff was a company incorporated under the Companies Act 2006 of the United Kingdom under the name of Vasseti (UK) PLC with the situation of its registered office in England and Wales. The plaintiff's shares are traded in the Frankfurt Stock Exchange. The issuance and tradability of its shares are governed by the United Kingdom's law. The principal officers who are in charge of the issuance and the validity of the shares are the company secretary and the share registrar, both of whom are based in the United Kingdom. The plaintiff's audited account relied on by the sixth defendant in purchasing his shares were prepared by a firm of auditors based in the United Kingdom. All these circumstances showed without any doubt strong connections with the United Kingdom. (paras 16 & 17)

(2) The shares were deemed issued in England and Wales by virtue of the plaintiff being incorporated in England and Wales. The shares were indeed the shares in the plaintiff while the transactions and dealings in the shares took place in the United Kingdom. Clearly, the situs of the

subject matter was in the United Kingdom. The alleged pleaded tort of conspiracy to injure that was the actual issuance of the shares and the breach of duties on the part of the defendants being the plaintiff's directors culminating with the alleged pleaded loss then purportedly suffered by the plaintiff were material to the question of appropriate forum. The whole dispute was wholly premised on, dependent upon and governed by the company law of the United Kingdom. The United Kingdom therefore would be a more suitable and competent forum to determine the dispute in line with the prevailing United Kingdom's case law. (para 17)

(3) The issue relating to the sixth defendant on whether he could exercise his rights as a shareholder of the plaintiff was to be decided by the courts in the United Kingdom. If the plaintiff was allowed to question the validity of the sixth defendant's shares before the High Court in Malaysia with parallel proceedings in the United Kingdom, this may well end up with conflicting decisions from two jurisdictions. It was thus abundantly clear that the substantial, the closest and the most real connection to the heart of the issue before this court lay with the United Kingdom. The defendants have made it clear they were willing to travel to the United Kingdom to testify as and when necessary. The defendants had access to and means for English legal representation. Hence, the question of the ease and convenience of relevant witnesses was a moot point in this issue of forum. (paras 18, 22 & 23)

(4) The applicability of the English laws is certainly an important factor that must be given weight. The court of the place of incorporation is very likely to be the appropriate forum though it may not be the exclusive forum. The questions of internal management of the plaintiff is governed by the law of the place of incorporation, and that the court of that place is best suited to give decisions on the control and extent of the powers of the management. The business aspect of the plaintiff, which was predominantly in Malaysia, had in this judgment no role to assist the court to determine the real core issue, which was whether the plaintiff's shares were properly issued to the first and second defendants which was the question of internal management of the plaintiff governed by the United Kingdom's laws. The British court was best suited to hear it. Thus, the defendants had successfully discharged their burden of showing that Malaysia was not the natural and appropriate forum for the determination of the dispute in this action. The plaintiff's action against the defendants was accordingly stayed. (paras 25, 26 & 28)

Bahasa Malaysia *Headnote*s

Kelima-lima rayuan ini berbangkit daripada lima permohonan berasingan yang difailkan oleh enam responden ('defendan-defendan') untuk penggantungan tindakan guaman perayu ('plaintif') atas alasan bahawa mahkamah Malaysia tidak sepatutnya mendengar isu-isu dan pertikaian yang

membentukkan hal perkara tindakan itu. Plaintif adalah sebuah syarikat awam berhad yang diperbadankan di United Kingdom. Alamat berdaftar plaintif adalah di Surrey, United Kingdom, dan alamat perniagaannya di Kuala Lumpur. Defendan pertama hingga kelima pada waktu material itu adalah pengarah plaintif, sementara defendan keenam adalah pemegang saham bagi saham-saham plaintif yang belum dibayar. Plaintif mendakwa bahawa defendan-defendan dengan salah dan dengan niat jahat berkomplot dan bergabung untuk menjejaskan plaintif dalam perniagaannya dengan objektif untuk sifon modal saham plaintif untuk kepentingan masing-masing dengan cara yang tidak sah. Seterusnya, plaintif mendakwa bahawa defendan pertama dan kedua telah melanggar undang-undang dan tanggungjawab fidusiari mereka kepada plaintif, melakukan frod terhadap plaintif dan mendapat manfaat dengan cara menyalahi undang-undang daripada pengeluaran dan pembahagian saham-saham belum dibayar yang diberikan kepada mereka yang telah direkodkan sebagai dibayar sepenuhnya dengan tambahan bahawa melalui tindakan menyalahi undang-undang ini, defendan pertama ke defendan keenam telah dengan jelasnya dan terang-terangan melanggar kewajipan mereka sebagai pengarah-pengarah plaintif di bawah pelbagai kewajipan dan obligasi undang-undang berkanun, amanah dan am. Dengan itu, plaintif telah mengalami kerugian dan melalui writ saman dan pernyataan tuntutan menuntut, antara lain, ganti rugi khas berjumlah €120,000,000 terhadap defendan pertama ke defendan kelima; injunksi terhadap defendan pertama, kedua dan keenam bagi melarang pemindahan, pelupusan dan pengurusan saham plaintif dan daripada melaksanakan apa-apa hak berhubungan dengan 1,200,000,000 saham termasuk mengundi, serta dengan ganti rugi am, faedah dan kos. Defendan pertama, kedua, kelima dan keenam masing-masing memfailkan permohonan lampiran 17, 25, 28 dan 30 sementara defendan ketiga dan keempat bersama-sama memfailkan permohonan untuk menggantungkan tindakan plaintif terhadap mereka atas alasan *forum non conveniens*. Mahkamah Tinggi, dalam menolak permohonan-permohonan tersebut, memutuskan bahawa isu teras sama ada 1.2 bilion saham plaintif yang diisukan kepada defendan pertama dan kedua dibayar sepenuhnya atau belum dibayar adalah lebih mudah didengar di Malaysia kerana pertikaian pada dasarnya adalah di antara rakyat Malaysia, yang perniagaan utamanya di Malaysia, dan fakta bahawa undang-undang United Kingdom mungkin diguna pakai bukan faktor yang menentukan *forum conveniens* atau *non conveniens*. Oleh itu, rayuan-rayuan ini. Intipatinya, adalah dihujahkan bahawa Hakim Mahkamah Tinggi telah khilaf dari segi undang-undang dan fakta kerana gagal memutuskan bahawa keterangan yang perlu dikemukakan mengenai kesahihan terbitan 1.2 bilion saham plaintif adalah keterangan, antara lain, dari pihak-pihak yang asasnya di United Kingdom iaitu setiausaha syarikat plaintif, pendaftar saham dan juruaudit yang telah menyediakan laporan tahunan dan penyata kewangan plaintif yang mengesahkan bahawa 1.5 bilion modal saham semasa plaintif telah dibayar sepenuhnya.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Plaintif adalah sebuah syarikat diperbadankan di bawah Akta Syarikat 2006 United Kingdom di bawah nama Vasseti (UK) PLC dan pejabatnya didaftarkan di England dan Wales. Saham-saham plaintif didagangkan di Frankfurt Stock Exchange. Pengeluaran dan dagangan saham-sahamnya dikawal oleh undang-undang United Kingdom. Pegawai utama yang bertanggungjawab atas pengeluaran dan kesahihan saham adalah setiausaha syarikat dan pendaftar saham, yang kedua-duanya berpangkalan di United Kingdom. Akaun audit plaintif yang dirujuk defendan keenam semasa pembelian sahamnya disediakan oleh syarikat juruaudit dari United Kingdom. Semua keadaan ini menunjukkan tanpa sebarang keraguan hubungan yang kuat dengan United Kingdom.

(2) Saham dianggap diisukan di England dan Wales atas fakta bahawa plaintif diperbadankan di England dan Wales. Saham-saham adalah saham-saham plaintif sementara transaksi dan urus niaga dalam saham berlaku di United Kingdom. Dengan jelasnya, situs hal perkara adalah di United Kingdom. Dakwaan tort konspirasi untuk merosakkan iaitu pengeluaran saham-saham dan pelanggaran kewajipan oleh pihak defendan sebagai pengarah plaintif memuncak dengan kerugian yang telah dialami plaintif penting bagi persoalan forum yang sesuai. Keseluruhan pertikaian adalah berasaskan sepenuhnya atas, bergantung kepada dan dikawal oleh undang-undang syarikat United Kingdom. Dengan itu, United Kingdom adalah forum yang lebih sesuai dan cekap untuk menentukan pertikaian selaras dengan kes undang-undang United Kingdom yang lazim.

(3) Isu berhubung dengan defendan keenam sama ada beliau boleh melaksanakan haknya sebagai pemegang saham plaintif harus ditentukan oleh mahkamah di United Kingdom. Jika plaintif dibenarkan mempersoalkan kesahihan saham defendan keenam di Mahkamah Tinggi Malaysia apabila terdapat prosiding selari dengan United Kingdom, ini mungkin berakhir dengan keputusan bercanggah dari dua bidang kuasa. Amat jelas bahawa hubungan yang sebenar, kuat dan paling dekat dengan inti isu di hadapan mahkamah ini terletak di United Kingdom. Defendan-defendan telah menyatakan dengan jelas bahawa mereka sanggup ke United Kingdom untuk memberi keterangan apabila diperlukan. Defendan-defendan mempunyai akses ke perwakilan undang-undang di United Kingdom. Oleh itu, persoalan kemudahan dan kesenangan saksi-saksi relevan adalah perkara yang boleh dipertikaikan dalam isu forum.

(4) Keterterapan undang-undang Inggeris adalah faktor penting yang perlu dipertimbangkan. Mahkamah di mana syarikat diperbadankan dilihat sebagai forum yang sesuai walaupun ia mungkin bukan forum eksklusif.

Persoalan pengurusan dalaman plaintif dikawal oleh undang-undang tempat diperbadankan, dan mahkamah tempat itu adalah paling sesuai untuk memberi keputusan berkenaan kawalan dan sejauh mana kuasa pihak pengurusan. Berkenaan aspek perniagaan plaintif yang berada di Malaysia, dalam penghakiman ini tidak memainkan peranan bagi membantu mahkamah menentukan isu teras, iaitu sama ada saham-saham plaintif telah diisukan secara betul ke defendan pertama dan kedua iaitu persoalan pengurusan dalaman plaintif yang dikawal oleh undang-undang United Kingdom. Mahkamah British adalah yang paling sesuai untuk mendengarnya. Defendan-defendan telah berjaya melepaskan beban mereka dalam menunjukkan bahawa Malaysia bukan forum yang sesuai bagi menentukan pertikaian tindakan ini. Tindakan plaintif terhadap defendan-defendan adalah digantungkan.

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Barkath Ali Abu Backer v. Anwar Kabir Abu Backer & Ors [1997] 2 CLJ Supp 295 HC ***(refd)***

Eng Liat Kiang v. Eng Bak Hern [1994] 3 SLR (R) 594 ***(refd)***

Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd, Hong Kong [1995] 4 CLJ 164 CA ***(refd)***

Konamaneni and Others v. Rolls-Royce Industrial Power (India) Ltd and Others [2002] 1 All ER 979 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23

Companies Act 2006 [UK], ss. 125, 303, 305, 994, 996

(Civil Appeal No: W-02(IM)(NCVC)-870-06-2015)

For the appellant - Gopal Sreenevasan & Leong Phaik Leng; M/s Sreenevasan Young

For the 1st respondent - Lim Kian Leong & Lui Kar Yee; M/s Lim Kian Leong & Co

For the 2nd respondent - Ranjit Singh, Owee Chia Ming & Villie Nethi; M/s Ranjit Singh & Yeoh

For the 3rd respondent - Mohd Izral Khairy & Tharminder Singh; M/s Izral Partnership

For the 4th & 5th respondents - Daniel Albert & Edmond Chek; M/s Daniel & Wong

For the 6th respondent - Jamie Wong; M/s Jamie Wong

(Civil Appeal No: W-02(IM)(NCVC)-809-05-2015)

For the appellant - Ranjit Singh, Owee Chia Ming & Villie Nethi; M/s Ranjit Singh & Yeoh

For the 1st respondent - Lim Kian Leong & Lui Kar Yee; M/s Lim Kian Leong & Co

For the 2nd respondent - Mohd Izral Khairy & Tharminder Singh; M/s Izral Partnership

For the 3rd & 4th respondents - Daniel Albert & Edmond Chek; M/s Daniel & Wong

For the 5th respondent - Jamie Wong; M/s Jamie Wong

For the 6th respondent - Gopal Sreenevasan & Leong Phaik Leng; M/s Sreenevasan Young

(Civil Appeal No: W-02(IM)(NCVC)-869-05-2015)

For the appellant - Mohd Izral Khairy & Tharminder Singh; M/s Izral Partnership

For the 2nd respondent - Ranjit Singh, Owee Chia Ming & Villie Nethi; M/s Ranjit Singh & Yeoh

For the 3rd & 4th respondents - Daniel Albert & Edmond Chek; M/s Daniel & Wong
For the 5th respondent - Jamie Wong; M/s Jamie Wong
For the 6th respondent - Gopal Sreenevasan & Leong Phaik Leng; M/s Sreenevasan Young

(Civil Appeal No: W-02(IM)(NCVC)-811-05-2015]
For the appellant - Daniel Albert & Edmond Chek; M/s Daniel & Wong
For the 1st respondent - Lim Kian Leong & Lui Kar Yee; M/s Lim Kian Leong & Co

(Civil Appeal No: W-02(IM)(NCVC)-810-05-2015)
For the appellant - Jamie Wong; M/s Jamie Wong
For the 1st respondent - Lim Kian Leong & Lui Kar Yee; M/s Lim Kian Leong & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-131-03-2015 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

Introduction

[1] These five appeals arose from five separate applications filed by the six defendants in the court below for a stay of the plaintiff's action on the ground that the Malaysian court should not hear the issues and disputes forming the subject matter of the action as there is a more appropriate forum to hear and decide such issues and disputes in the interests of all the parties and for the ends of justice. These applications which were heard together were dismissed by the High Court on 22 April 2015. For convenience, we heard these appeals together. At the conclusion of the arguments, we accordingly allowed the appeals. For the ease of reference, parties to these consolidated appeals will be referred to as they were in the court below. We shall lay down some of the material facts first and thereafter consider the merits of, and give our reasons for allowing these appeals.

Summary Of Material Facts

[2] The plaintiff is a public limited company incorporated in the United Kingdom on 29 June 2011 and was admitted to trade in the Stock Exchange of Frankfurt, Germany in August 2011. The registered address of the plaintiff is in Surrey, United Kingdom while its business address is in Kuala Lumpur. The plaintiff is an investment holding company and its subsidiaries are principally engaged in the business of telecommunications, Internet access and related services and operator of a golf course. The first to fifth defendants were at all material times directors of the plaintiff until their respective resignations between 8 July 2013 to 28 February 2014. The third defendant was also the plaintiff's Chief Financial Officer. The sixth defendant was a purported shareholder of unpaid shares in the plaintiff.

[3] At the time of incorporation, the original shareholders of the company were the first and second defendants each holding 840,000,000 and 360,000,000 units of shares at par value of €0.10 each share respectively. These shares were entered in the records of the plaintiff as fully paid. However there was no record of any resolution of directors or members authorising the issuance and allotment of these shares to the first and second defendants. As events turned out, it had come to the plaintiff's attention that the abovementioned blocks of shares held by both the first and second plaintiffs were in fact unpaid capital and that it was wrongly entered in the plaintiff's record as fully paid.

[4] The annual returns for financial years 2012 to 2014 meanwhile, would show that the first and second defendants had unlawfully, negligently and fraudulently disposed of, dealt with or distributed these unpaid blocks of shares to various parties without ensuring that the same were fully paid. One of the recipients of such unpaid shares was the sixth defendant who purportedly owned 100,000,000 units of shares in the plaintiff. When these alleged acts were committed by the first and second defendants, the first to fifth defendants were the directors of the plaintiff.

[5] The plaintiff had thus claimed that the defendants wrongfully and maliciously conspired and combined amongst themselves to injure the plaintiff in the business with an objective to siphon the share capital of the plaintiff for their respective benefits by unlawful means.

[6] It was further alleged that the first and second defendants had violated laws and breached their fiduciary duties which they owed to the plaintiff, committed fraud against the plaintiff and unlawfully benefited from the issuance and allotment of the unpaid shares to them which were recorded as fully paid adding that by reason of these unlawful acts, the first to sixth defendants had clearly and blatantly breached their duties as directors of the plaintiff under various statutory, fiduciary and common law duties and obligations. The plaintiff consequently had suffered loss and damage and by writ of summons and statement of claim dated 16 March 2015 claimed for *inter alia*:

(a) a declaration that the first to fifth defendants had acted in breach of their statutory, regulatory, fiduciary and/or common law duties and obligations as the directors of the plaintiff;

(b) special damages in a sum equivalent to €120,000,000 against the first to fifth defendants;

(c) an order that the first, second and sixth defendants pay to the plaintiff the par value of the plaintiff's shares currently held or received by them or which had been transferred by them to any third parties;

(d) an injunction against the first, second and sixth defendants to prevent the transfer, disposal and dealing with the plaintiff's shares and from exercising any right in relation to the 1,200,000,000 shares including voting; and

(e) general damages, interest and costs.

[7] All the six defendants entered an appearance but filed the stay applications soon after that.

The Applications

[8] The first, second, fifth and sixth defendants filed their respective applications in encls. 17, 25, 28 and 30 while the third and fourth defendants jointly filed their application in encl. 22 to stay the plaintiff's action against them on the ground of *forum non conveniens*. These applications were dismissed by the learned judge on 22 April 2015 when Her Ladyship held that the core issue of whether the 1.2 billion shares in the plaintiff issued to the first and second defendants were fully paid or unpaid would more conveniently be heard in Malaysia as the dispute essentially was between mainly Malaysians, whose business was predominantly in Malaysia and the fact that the laws of the United Kingdom might apply was not a determining factor in the matter of *forum conveniens* or *nonconveniens*.

The Appeal

[9] The appeals primarily are directed against the learned judge's decision on the core issue that the validity of the 1.2 billion shares in the plaintiff issued to the first and second defendants would more conveniently be heard in Malaysia when the determination of this core issue is a matter within the purview of the laws of the United Kingdom. In gist, it is contended that the learned judge had erred in law and in fact in failing to hold that the necessary evidence to be adduced on the validity of the issuance of the 1.2 billion shares in the plaintiff is the evidence amongst others, of parties based in the United Kingdom namely the plaintiff's company secretary, share registrar and the auditors who prepared the plaintiff's annual reports and financial statements which confirmed that the plaintiff's 1.5 billion current share capital was fully paid up.

Decision

[10] Having perused the appeal records and in particular the plaintiff's statement of claims, the affidavits in support of the applications, the affidavits in reply of the plaintiff and other relevant documents, we would say that the heart of the matter in this dispute is the issuance of the unpaid shares which were allegedly masquerading as paid shares. The plaintiff's claim was premised on the breach of fiduciary duties by the first to fifth defendants in causing the unpaid shares of the plaintiff to be issued to the first and second defendants and recorded as fully paid and allowed both defendants to dispose

of the same, deal with and distribute the said unpaid shares to various other parties. From this plea, the plaintiff then alleged that all of the defendants conspired to injure the plaintiff in the business with an objective to siphon the share capital of the plaintiff for their respective benefits by unlawful means.

[11] This was next followed by a specific plea against the sixth defendant of being the recipient of part of the unpaid shares and was therefore barred from requisitioning a general meeting or to vote at a meeting. Thus, the issue central to the claim, as we understand it, is the question whether the plaintiff's 1.2 billion shares were properly issued and allotted to the first and second defendants and the effect of such improper issuance and allotment. However, the issue under consideration in these appeals is the exercise of the discretionary power of the court of first instance to stay proceedings grounded on the doctrine of *forum non conveniens*. The law, we apprehend, is that the defendants would have to satisfy the court that some other forum is more appropriate, and that it would be obligatory for a Malaysian court to consider in any event whether it would be unjust to the plaintiff to confine the defendants to remedies elsewhere. The defendants in this regard, submit that it is both illogical and perversely counter-intuitive to permit the plaintiff to pursue this cause of action half a world away from the unfolding of the actual events that inform and affect the present suit. This can be construed as an abuse of court process.

[12] The plaintiff's submission in essence is that the High Court of Malaya has jurisdiction to hear this dispute by virtue of s. 23 of the Courts of Judicature Act 1964 and that Malaysia is the most appropriate forum to hear the suit, the defendants bear the burden of proof in an application for a stay of proceedings on the ground of *forum non conveniens* and it would cause an injustice to the plaintiff if the case is heard elsewhere.

[13] We are mindful of what clearly to be discernible guidance from the Federal Court in *American Express Bank Ltd v. Mohamad Toufic al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160 in considering the course that the court should take in dealing with an application for a stay of proceedings on the ground of *forum non conveniens*. The relevant extract of the judgment is set out below:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in *The Spiliada*. Where, on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved, then according to the reasoning of Lord Templeman, the plaintiff (not the defendant, be it noted), would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case, the burden lay on the bank customers, the plaintiffs, to satisfy the High Court below that Malaysia was the most appropriate forum.

A Having regard to the reasoning of the learned Law Lords in *The Spiliada* and the reasoning of Lord Templeman (*supra*) aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most B important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with *forum non conveniens*.

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in C applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualise a large number of factors which overlap with one another.

[14] Based on this decision, it would be incumbent upon the defendants to D show to this court that some other forum is more appropriate and that it would be unjust to the plaintiff to confine the defendants to remedies elsewhere before we could be persuaded to grant the stay of proceedings on this ground (see also *Barkath Ali Abu Backer v. Anwar Kabir Abu Backer & Ors* [1997] 2 CLJ Supp 295; [1997] 4 MLJ 389). The defendants would have to E bring forward and set out all the relevant factors for this court to weigh in the balance.

[15] It would also be a salutary reminder and we should indeed always bear in mind that all applications turn on its own facts. In this regard the Court of Appeal in *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company* F *Ltd, Hong Kong* [1995] 4 CLJ 164; [1995] 1 MLJ 322 held as follows:

There is much to be said in favour of leaving the law upon this subject in a state of certainty. Equally, it is also desirable that there be uniformity in the common law. No decision has been cited to us to show that the *The Eleftheria* test has been questioned in the jurisdiction from which it G emanates or, for that matter, in any other jurisdiction. It must not be forgotten that what is under consideration is the discretionary power of a court to stay proceedings. The advantages of leaving the question of whether a stay should be granted or refused with the judge of first instance has not found any insuperable difficulty in other areas of the law where discretionary relief is sought and I am therefore of the view that H no exception is warranted in this area of the law.

To summarise, the relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations that have to be weighed in the balance when deciding whether to give effect to a forum selection clause or to ignore it are matters pre-eminently within the province of the trial judge. Usually in this type of case, evidence I is almost always given on affidavit with hardly any question of credibility arising. Since each case depends on its own facts, little or no assistance is to be derived from a copious citation of other decided cases. The judge

should be allowed to read, in the quiet of his chambers, the evidence filed in the case and the argument that is addressed to him should be crisp and brief.

[16] We would start off with the fact that the plaintiff is a company incorporated under the Companies Act 2006 of the United Kingdom under the name of Vasseti (UK) PLC with the situation of its registered office in England and Wales. The plaintiff's shares are traded in the Frankfurt Stock Exchange. The plaintiff changed its name to its present style pursuant to a duly passed resolution on 11 August 2014. The issuance and tradability of its shares are governed by the United Kingdom's law. The principal officers who are in charge of the issuance and the validity of the shares are the company secretary and the share registrar, both of whom are based in the United Kingdom. The plaintiff's audited account for the year ended 31 December 2013 relied on by the sixth defendant in purchasing his shares were prepared by a firm of auditors based in the United Kingdom.

[17] All these circumstances, in our opinion, show without any doubt strong connections with the United Kingdom. The shares are deemed issued in England and Wales by virtue of the plaintiff being incorporated in England and Wales. The shares are indeed the shares in the plaintiff while the transactions and dealings in the shares took place in the United Kingdom. Clearly, the situs of the subject matter is in the United Kingdom. The alleged pleaded tort of conspiracy to injure that is the actual issuance of the shares and the breach of duties on the part of the defendants being the plaintiff's directors culminating with the alleged pleaded loss then purportedly suffered by the plaintiff are material to the question of appropriate forum. The whole dispute is wholly premised on, dependent upon and governed by the company law of the United Kingdom. The court in this regard will adopt the system of law which the transaction has the closest and most real connection (*Barkath Ali Abu Backer v. Anwar Kabir Abu Backer & Ors*, *supra*). The United Kingdom therefore would be a more suitable and competent forum to determine the dispute in line with the prevailing United Kingdom's case law.

[18] In any event, the affidavits in support of the application patently show that the defendants have access to and means for English legal representation and are willing and able to travel to the United Kingdom to give evidence, as and when necessary. Hence, the question of the ease and convenience of relevant witnesses is a moot point in this issue of forum.

[19] In *Eng Liat Kiang v. Eng Bak Hern* [1994] 3 SLR (R) 594, where the application to have the claims stayed in respect of the Malaysian shares and land on the ground that the Singapore court had no jurisdiction in relation to claims for immovable properties in foreign lands, and alternatively, on the basis of *forum non conveniens*, the High Court of Singapore held that Malaysia was clearly the more appropriate forum. As regards the shares, the connections with Malaysia were strong. They were shares in companies

incorporated in Malaysia; Malaysian law governed their creation, validity, how they might be transferred, and the creation of a trust over them; many relevant facts occurred in Malaysia; and a Malaysian determination would be more final because the Malaysian court deciding on the issues relating to shareholding in a Malaysian company would not be bound by a Singapore decision.

[20] In a subsequent event, it transpired that the sixth defendant had requested to convene the general meeting of the plaintiff. However the plaintiff claimed that the sixth defendant could not do. The request was made pursuant to s. 303 of the United Kingdom's Companies Act 2006 seeking the passing of ordinary resolutions to remove directors and appointing in their place new directors. The validity of the request is governed by the law of the United Kingdom. As the plaintiff refused to convene the general meeting, the sixth defendant issued a notice under s. 305 of the same Act to convene the general meeting in the United Kingdom on 16 April 2015.

[21] The plaintiff subsequently in its application for an injunction before the High Court at Kuala Lumpur, has taken the position that the sixth defendant is not even in the position to issue the request because his shareholding has dipped below 5%. This happened after the plaintiff through its Board of Directors purported to increase its capital by issuing in excess of 7 billion shares to one Open Fibre Sdn Bhd, which took place after the sixth defendant had made his request. The issue of these new shares had the effect of diluting the sixth defendant's shareholding in the plaintiff from 6.667% of the plaintiff's issued share capital to 1.17%. The sixth defendant had obtained advice from his lawyers in the United Kingdom regarding the issuance of the 7 billion shares who advised him that the said issuance of the shares was done unlawfully. Subsequently, the sixth defendant commenced two actions that is Claim No. 2692/2015 and Claim No. 2693/2015 in the United Kingdom on 14 April 2015 pursuant to s. 125 and s. 994 of the United Kingdom's Companies Act 2006 respectively in connection with the issuance of the 7 billion shares seeking an order under s. 125 deleting the name of Open Fibre Sdn Bhd from the plaintiff's register of members as the holder of 7 billion shares and an order under s. 996 of the Companies Act 2006 declaring that the notice of general meeting dated 16 March 2015 and issued pursuant to s. 305 of the same Act convening a meeting of the plaintiff on 16 April 2015 is a valid notice, and the general meeting convened under the notice of general meeting dated 16 March 2015 can take place on 16 April 2015.

[22] The issue relating to the sixth defendant on whether he can exercise his rights as a shareholder of the plaintiff falls to be decided by the courts in the United Kingdom. If the plaintiff is allowed to question the validity of the sixth defendant's shares before the High Court in Malaysia with parallel proceedings in the United Kingdom, this may well end up with conflicting

decisions from two jurisdictions. In any event, the plaintiff, who is a defendant in the two actions commenced by the sixth defendant in the United Kingdom had applied to stay the proceedings there on the ground of forum *non conveniens* which application was dismissed by the United Kingdom's High Court on 2 July 2015.

[23] It is abundantly clear that the substantial, the closest and the most real connection to the heart of the issue before this court lies with the United Kingdom. The only real substantial connection with Malaysia is really the personalities involved. However as earlier-stated all the defendants have said that they are willing to travel to the United Kingdom to testify as and when necessary.

[24] The learned judge, despite the overwhelming connection with the United Kingdom, dismissed the defendants' applications principally on the ground that the dispute is mainly between Malaysians, whose business is predominantly in Malaysia and the fact that the United Kingdom's laws may apply is not a determining factor in the matter of *forum conveniens* or *non conveniens*. We would in this regard note that in fact these are the grounds relied on by the plaintiff in opposing these applications. With respect to the learned judge, in arriving at her decision, she had erred in failing to consider that the plaintiff's own annual reports and financial statements until the time it commenced the action in the court of first instance, confirmed that all of its shares were fully paid up. The professionals and neutral parties who prepared these documents are the crucial witnesses and based in the United Kingdom.

[25] The applicability of the English laws is certainly an important factor that must be given weight. The correct approach would be to say that the court of the place of incorporation is very likely to be the appropriate forum though it may not be the exclusive forum. But the questions of internal management of the plaintiff is governed by the law of the place of incorporation, and that the court of that place is best suited to give decisions on the control and extent of the powers of the management. This approach has found favour with the case of *Konamaneni and Others v. Rolls-Royce Industrial Power (India) Ltd and Others* [2002] 1 All ER 979 and we reproduce below the relevant excerpts of the decision thereof:

> Two points are being made by Pennycuick J. The first is that the extent of the duties of the director of a foreign company is governed by the law of that company's place of incorporation. The second is that the courts of that place are 'the only proper tribunal' in which the members can seek to control the exercise of that power. The first point is unexceptional and indeed obvious, but it may be that the second proposition goes too far, in allocating exclusive responsibility to the courts of the place of incorporation for making orders controlling the exercise of discretionary powers. The decision predates the development of the modern *forum non conveniens* principles from later in the 1970s (see *The Atlantic Star, Owners of*

A *the Atlantic Star v. Owners of the Bona Spes* [1973] 2 AII ER 175, [1974] AC 436), and was given at a time when the prevailing view was that if the English court had jurisdiction, there was not normally a discretion to refuse to exercise it. If a similar point were to arise for decision today, I consider that the correct approach would be to say that the courts of the place of incorporation are very likely indeed to be the appropriate
B forum, but not so overwhelmingly that they will necessarily be the exclusive forum. So understood, the *Pergamon Press* case confirms that questions of internal management are governed by the law of the place of incorporation, and that the courts of that place are best suited to give decisions on the control and extent of the powers of the management.

C **[26]** Finally, the business aspect of the plaintiff which according to the learned judge and learned counsel for the plaintiff in his submission is predominantly in Malaysia, has in our judgment no role to assist the court to determine the real core issue, which is whether the plaintiff's shares were properly issued to the first and second defendants which is as we have stated
D above, the question of internal management of the plaintiff governed by the United Kingdom's laws and the British court is best suited to hear it.

[27] In our view the learned judge had misdirected herself on this issue and had given consideration to irrelevant matter in the exercise of her discretion to dismiss the appellant's application.

E **Conclusion**

[28] Based on the foregoing discussion and reasons, we would in conclusion hold that the defendants have successfully discharged their burden of showing that Malaysia is not the natural and appropriate forum for the determination
F of the dispute in this action. The circumstances described above have been considered in totality and it plainly shows and the defendants have indeed shown to our satisfaction that the United Kingdom's forum is one with which this action has the most real and substantial connection. The United Kingdom's court is therefore in our judgment clearly the more appropriate forum where the case ought to be heard in the interest of the parties and to
G serve the ends of justice. In the event, we allow these appeals and set aside the decision of the High Court. The plaintiff's action against the defendants are accordingly stayed. We make no order as to costs and the deposits shall be refunded to the defendants.

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